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No. 208

In the Supreme Court of the United States

OCTOBER TERM, 1962

MILDRED SEXTON, EXECUTOR OF THE LAST WILL OF BERTHA BIRK KLEIN, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:

Brown v. *Routzahn*, 63 F. 2d 914, certior. ri denied, 290 U.S. 641 — 7

Cerf v. *Commissioner*, 141 F. 2d 564 — 6

Hardenbergh v. *Commissioner*, 198 F. 2d 63, certiorari denied, 344 U.S. 836 — 6

Helvering v. *Grinnell*, 294 U.S. 153 — 9

Statute:

Internal Revenue Code of 1954:

Sec. 2036 (26 U.S.C. 2036) — 2, 6

Sec. 2036(a) (26 U.S.C. 2036(a)) — 2, 6

Sec. 2037 (26 U.S.C. 2037) — 6

Sec. 2038 (26 U.S.C. 2038) — 6

648643—62

QUESTION PRESENTED

The decedent and other beneficiaries of a trust created by their father agreed to extend the term of the trust, thus postponing the distribution to them of the trust corpus. As a result, the decedent retained the right to the income from her share of the corpus for a period which did not in fact end before her death. The question is whether the value of decedent's share of the trust corpus should be included in her gross estate under Section 2036(a)(1) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 2036. TRANSFERS WITH RETAINED LIFE ESTATE.
>
> (a) *General Rule.*—The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—
>
> (1) the possession or enjoyment of, or the right to the income from, the property, or
>
> (2) the right, either alone or in conjunction with any person, to designate the persons who

shall possess or enjoy the property or the income therefrom:

* * * * * *

(26 U.S.C. 2036(a).)

STATEMENT

The facts, which were stipulated (R. 10-14), may be summarized as follows:

Bertha Birk Klein (the decedent) died on October 22, 1955. (R. 4.). Jacob Birk, her father, had created a trust in 1918, the corpus of which consisted of certain real estate in Cook County, Illinois. (Supp. R. 8a-28a.) The decedent was one of seven children of Jacob Birk named as beneficiaries, and was given a one-seventh interest in the income of the trust (Supp. R. 19a), evidenced by a trustees' certificate (Supp. R. 20a-21a), and also a one-seventh interest in the corpus of the trust upon termination (Supp. R. 25a). In the event of the decedent's death before termination of the trust, her interest was to go to the person or persons appointed by her in her last will, subject to the proviso that the appointee must be a lineal descendant of the settlor. In default of appointment, the interest would pass to her executrix, administratrix or legal representative. (Supp. R. 21a, 25a.)

Article VI of the trust agreement provided that the trust "shall terminate at the expiration of twenty years after the death of said Jacob Birk." (Supp. R. 25a.) Jacob Birk died on March 2, 1920. (Pet. 6a);

[2] "Supp. R." references are to the appendix to the Government's brief filed in the court of appeals.

consequently, the prescribed termination date was March 2, 1940.

Article V of the agreement stated that "This agreement may be amended and modified from time to time by an instrument in writing, delivered to the Trustees, signed by the Beneficiaries owning and holding at least two-thirds in value of the certificates issued hereunder by the Trustees, and by at least a majority of the then existing Trustees." (Supp. R. 24a–25a.)

On January 18, 1940, all of the trustees and all of the beneficiaries joined in executing the first of three purported extensions of the duration of the trust. This instrument amended Article VI so that the termination date would be thirty rather than twenty years after the settlor's death. (Supp. R. 29a–30a.) A second extension provided that the trust was to terminate thirty-five years after the death of Jacob Birk, *i.e.*, on March 2, 1955. (Pet. 6a; Supp. R. 31a–33a.) The final amendment extended the date to March 2, 1965. (Pet. 6a–7a; Supp. R. 34a–35a.)

The decedent exercised her testamentary power to appoint her share of the corpus to a lineal descendant of the settlor and, under her will, the petitioner acquired the beneficial interest of the decedent, her mother, in 1955. (R. 12; Pet. 11.)

The petitioner, as executor of her mother's will, brought this action for refund of federal estate taxes representing the payment of a deficiency of $67,928, plus interest, asserted against the estate and attributable to the inclusion in the gross estate of $317,493 as

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[3] On April 9, 1954, when the decedent was 91 years of age, she was judicially declared an incompetent and a conservator of her estate was appointed. (R. 12.)

the value of the decedent's interest in the corpus under the trust agreement. Both courts below denied the refund. (Pet. 5a.)

ARGUMENT

Contrary to petitioner's suggestion, this case presents no question of general importance appropriate for review by this Court. The decisions below turn upon the construction of the language of a particular and unusual trust instrument. Nor is the claim of conflict well founded.

1. Section 2036(a) of the Internal Revenue Code of 1954, *supra*, pp. 2–3, provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, under which he had retained, for life or for any period which does not in fact end before his death, the right to the income from the property. In this case the decedent was one of several income beneficiaries of an *inter vivos* trust created by her father in 1918, which was to terminate twenty years after his death. Upon termination, the decedent and the other life income beneficiaries would each be entitled to receive a fractional share of the trust corpus. (Supp. R. 25a–26a.) The decedent's father died in 1920 (Pet. 6a), and, therefore, according to its terms, the trust was to terminate in 1940. Just prior to the termination date, all of the trustees and all of the then living beneficiaries (including the decedent) joined in executing an instrument which postponed termination for a period of years. (Pet. 6a; Supp. R. 29a–30a.) Accordingly, although the

decedent had a right to receive her share of the trust corpus in 1940, she relinquished that right by joining with the other beneficiaries and the trustees in extending the trust term. As the court below concluded (Pet. 9a):

> This joint action unquestionably constituted a relinquishment by the group, severally and jointly, of the property interests in the corpus which would have been distributed to them absent an extension of the trust. Actually, therefore, decedent by participating in the group action affirmatively acted to relinquish her right to her share of the trust corpus.

Such relinquishment of her rights in the corpus, as the court of appeals further stated (Pet. 10a), constituted a "transfer of her property interest" therein.[4] If this is so, as seems plain, then there can be no question that the other pertinent conditions of Section 2036(a)(1) were met. Petitioner did retain the right to receive the income for a period which did not in fact end before her death.[5]

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[4] The relinquishment of a right to control the amendment of a trust instrument has similarly been held to be a transfer for federal gift tax purposes. *Carf* v. *Commissioner*, 141 F. 2d 564, 566–567 (C.A. 3d). Compare *Hardenbergh* v. *Commissioner*, 198 F. 2d 63 (C.A. 8th), certiorari denied, 344 U.S. 836.

[5] The Government also argued in the courts below that the amendment of the agreement extending the duration of the trust was tantamount to a transfer of the decedent's property with retention of interest within the meaning of Section 2037 (transfers taking effect at death) and Section 2038 (revocable transfers) of the Internal Revenue Code of 1954 (26 U.S.C. 2037 and 2038), as well as Section 2036. (Pet. 8a.) However, the court below found it unnecessary to pass on the other cited sections, viewing the trust corpus as "taxable at least under Section 2036(a)(1)." (Pet. 10a.)

2. There is no conflict of decisions. The decision of the Sixth Circuit in *Brown* v. *Routzahn*, 63 F. 2d 914, certiorari denied, 290 U.S. 641, upon which petitioner relies (Pet. 4), differs significantly. In that case, the decedent's wife died in 1912 leaving a will under which her husband was given one-third of all her property, real and personal, the residue being left in trust to pay the income to him for life, with remainders over. The will provided that the gifts to the husband were in lieu of dower. The decedent-husband came into probate court about six months after his wife's death and elected to take under the will. In 1920, the executors of the wife's estate filed an application for an order of distribution of her estate, attached to which application was a renunciation of the decedent's right to one-third of the estate. The probate court thereupon ordered all of the property in the wife's estate to be distributed to the testamentary trustees. When the decedent died three years later, at the age of 75, the Commissioner of Internal Revenue determined that the renunciation by the decedent was a transfer in contemplation of death under the pertinent provision of the Revenue Act then in force, and included the value of the renounced property in the decedent's gross estate. The estate paid the tax, filed a claim for refund, which was denied, and then filed suit in the district court. After that court dismissed the complaint, the Sixth Circuit reversed the judgment on the ground that the law of Ohio does not require a legatee to accept or reject a bequest within any specified time, and that a rejection made at any time before distribution is valid; the court also

held that the decedent never owned nor controlled the property as legatee.

In the instant case, the decedent was both income and remainder beneficiary of an *inter vivos* trust which she and the other beneficiaries accepted at the time the trust was created. (Supp. R. 27a–28a.) Moreover, the instrument dated January 18, 1940, executed by the beneficiaries, recited that they were the *owners* and holders of all the certificates issued under the trust and of all the beneficial interests therein. (Supp. R. 29a–30a.) The agreement of February 20, 1950, signed by the trust beneficiaries also recited that the decedent and the other beneficiaries were "the owners" of not less than two-thirds of the value of the beneficial interests in the trust. (Supp. R. 31a.) The agreement of January 31, 1955, contains a similar recital. (Supp. R. 34a–35a.) Thus there can be no doubt that the decedent and the other beneficiaries accepted their beneficial interests in the trust when it was created in 1918 and the trust corpus was conveyed to the trustees. It follows that when the decedent and the other beneficiaries relinquished their right to receive their respective shares of the trust corpus in 1940 they made transfers of their property interests in the trust corpus which they had owned since 1918. Moreover, the decedent here plainly exercised dominion over the corpus. She made a transfer under which she continued to retain the right to enjoy the income. She also retained and exercised a testamentary power of appointment over the corpus.

The petitioner also argues that the decision below is "probably contrary to the principles underlying this Court's decision in *Helvering* v. *Grinnell*, 294 U.S. 153." (Pet. 4.) In that case, John O. Stone died in 1876, a resident of New York, leaving a will in which he created a trust fund for the benefit of his daughter, Annie, who was to receive the income therefrom during her life, and who had the power to appoint the corpus by last will. In default of such appointment, her share of the estate was to go to her children, or, if there were no issue, to her next of kin. Annie Stone died in 1927, unmarried, without issue and leaving her two sisters as sole next of kin. Her will provided that any property subject to the power of appointment under her father's will should go to her sisters. After her death the two sisters in writing renounced their right to receive the property under her will and elected to take under the provisions of their father's will. The Commissioner of Internal Revenue determined that the value of the trust corpus subject to the power of appointment by Annie should be included in her estate under Section 302(f) of the Revenue Act of 1926, c. 27, 44 Stat. 9. This Court ruled to the contrary, on the ground that the property had not *passed* under the power of appointment. Obviously *Grinnell* has no bearing on the instant case. The issue here does not in any way depend upon whether property passed under the will of the donor of the power of appointment or under the will of the donee of that power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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